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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD HODGES, Defendant and Appellant.	A095337 (Solano County Super. Ct. No. FCR184904)
In re RICHARD HODGES, on Habeas Corpus.	A100072

INTRODUCTION

Richard Hodges appeals from a judgment of conviction after pleading no contest to three counts of committing lewd or lascivious acts on a child by force or violence. He contends the trial court violated his right to due process by failing to initiate proceedings to determine his competency to stand trial. On appeal, and also in a petition for writ of habeas corpus, he further contends he was denied effective assistance of counsel.

BACKGROUND

Hodges was charged with aggravated sexual assault of a child (oral copulation) (Pen. Code, § 269, subd. (a)(4)),[1] continuous sexual abuse of a child (§ 288.5, subd. (a)), and four counts of lewd or lascivious acts upon a child (§ 288, subd. (a)). (The details of

the offenses allegedly committed against his teenaged daughter between May 1 and July 29, 2000, are not relevant to the issues raised on appeal.) On November 14, 2000, the district attorney amended the complaint to add three counts of lewd and lascivious acts upon a child by force or violence (§ 288, subd. (b)), to which Hodges pleaded no contest in exchange for dismissal of the six original counts and a pending misdemeanor charge, and termination of probation imposed in two previous cases.

After replacing his conflict defender with retained counsel, Hodges obtained an order for a confidential psychological examination (Evid. Code, § 1017), and moved to withdraw his plea on the grounds that he had not knowingly and intelligently waived his rights because of his "medical and mental condition at the time," and counsel's failure to advise him "regarding possible defenses." After reading the report of clinical psychologist Carlton Purviance and hearing his testimony, the court denied Hodges's motion, and sentenced him to three consecutive eight-year terms, for a total of 24 years in prison, "pursuant to your original agreement." Hodges filed a timely notice of appeal from the sentence imposed and "the denial to withdraw plea." We consider his petition for habeas corpus with this appeal.

DISCUSSION

I. Competency Hearing

Hodges first contends he was denied due process of law by the trial court's failure to initiate proceedings to determine his competence to stand trial. "The principles that apply to [this] claim are well settled. A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence. [Citations.] Substantial evidence for these purposes is evidence that raises a reasonable doubt on the issue. [Citation.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1163.) "Although no particular facts signal incompetence, suggestive evidence includes a defendant's demeanor before the trial court, previous irrational behavior, and available medical evaluations. [Citations.]" (*Moran v. Godinez* (9th Cir. 1994) 57 F.3d

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

690, 695 (*Moran III*). "The substantial evidence test is satisfied if a . . . psychologist who has had a sufficient opportunity to examine the accused, states that in his professional opinion the accused is incapable due to mental illness of understanding the purpose or nature of the proceedings against him or is incapable of assisting in his defense or cooperating with his counsel. [Citations.]" (*People v. Stiltner* (1982) 132 Cal.App.3d 216, 223 (*Stiltner*).) "Evidence that merely raises a suspicion that the defendant lacks present sanity or competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing. [Citations.]" (*People v. Deere* (1985) 41 Cal.3d 353, 358.) More is required than bizarre actions or statements, or expert testimony that defendant is "immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to [his] ability to assist in his own defense." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285.) "The standard for competence to stand trial requires nothing more than that a defendant have some minimal understanding of the proceedings against him. [Citation.]" (*U.S. v. Hernandez* (9th Cir. 2000) 203 F.3d 614, 620, fn. 8.)

Once a defendant comes forward with substantial evidence of incompetence to stand trial, due process requires a full competency hearing, even if there is also evidence of competency. (*People v. Welch* (1999) 20 Cal.4th 701, 738.) "If, on the other hand, the evidence of present incompetency is less than substantial, whether or not to order a hearing is within the discretion of the trial judge. [Citations.]" (*Stiltner, supra*, 132 Cal.App.3d at p. 223.) "[O]nly where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal." (*People v. Pennington* (1967) 66 Cal.2d 508, 518 (*Pennington*).)

Evidence regarding Hodges's mental competence was introduced at the May 2, 2001, hearing on his motion to withdraw his plea, in the form of Dr. Purviance's testimony and his written report dated March 14, 2001, which was also attached to the probation officer's report reviewed by the sentencing court. Purviance initially met with Hodges on August 27 or 28, 2000, at the request of appointed counsel for purposes of

section 288.1 (report on mental condition prerequisite to suspended sentence). On March 5, 2001, at retained counsel's request, Purviance evaluated Hodges again, this time to ascertain whether on November 14, 2000, he had been able to enter a knowing and intelligent plea. On both occasions, Purviance reviewed Hodges's medical records. He did not focus on Hodges's competence to stand trial, nor did he offer an opinion as to whether, at any given time, Hodges was "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner" (§ 1367, subd. (a)). But Hodges maintains the evidence contained "three sets of facts"—suicide attempts, medication, and general mental condition—sufficient to mandate a competency hearing. We examine that evidence and reject the contention.

According to Purviance, the 45-year-old Hodges developed a significant alcohol problem by the age of 30, and shortly thereafter, began to experience a series of major depressive episodes, which sometimes led to suicide attempts. In his early 30's, when his wife threatened to leave him, "he felt a strong impulse to shoot himself in the head," but instead completed a 30-day rehabilitation program. A few years later, his wife did leave him. He became "seriously depressed" and began seeing a psychiatrist, who diagnosed anxiety, depression and alcoholism, and prescribed anxiolytic and antidepressant medications. He remarried, continued to drink, became dependent on one of his prescription drugs, and his depression worsened. At the age of 42, these conditions intensified when his wife was diagnosed with breast cancer.

Hodges thrice attempted suicide. In the spring of 1999, he took a deliberate overdose of a prescription drug, lapsed into unconsciousness, was hospitalized, and began seeing a psychiatrist, who diagnosed "a recurring and cycling mood disorder," and prescribed antidepressants. The following winter (1999-2000), he took all the prescription medication he had on hand, became comatose, spent four days in intensive care, then transferred to an inpatient psychiatric unit where he was treated with

antidepressants and psychotherapy.[2] He was diagnosed as suffering from depression and alcohol abuse and discharged after seven to ten days, at which time he resumed psychiatric treatment, continued on antidepressants and continued to drink excessively. While in custody on August 10, 2000, Hodges once again attempted suicide by severely lacerating his neck and arms. After surgical treatment, he remained in the jail's medical wing on "fairly heavy doses" of "a wide range of potent psychoactive medications," to wit, three antidepressants and a mood stabilizer. After a while, his mental state gradually began to improve. When Purviance first interviewed Hodges 17 or 18 days after his third suicide attempt, he was "severely depressed" and still having "suicidal ideation." His "mentation was slowed," and "his utterances were labored and somewhat concrete in quality." Even so, he understood the charges against him, and Purviance did not advise counsel that he was mentally unable to engage in negotiations to resolve the case. Hodges told Purviance he had not been thinking clearly when he entered his plea in November 2000, but Purviance admitted he could not retroactively ascertain Hodges's mental state on that earlier occasion. By the time of Purviance's March 5, 2001, evaluation, Hodges's "overall mental state ha[d] markedly improved" in both reasoning ability and affect on the medication regimen, though he continued to show signs of depression.

Nothing in the evidence suggests Hodges was "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner" (§ 1367, subd. (a)), but he relies on several federal due process cases, in which

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[2] At the hearing, Purviance testified the second suicide attempt occurred "approximately 18 months before this incident." If "this incident" refers to the alleged molestations (between May 1 and July 29, 2000), it would place the second suicide attempt between November 1998 and January 1999, or before the first suicide attempt. In his reply brief, Hodges suggests Purviance said or meant "eight" months before the alleged molestations, which would put the second attempt between September and November 1999. This would comport more or less with medical records attached as an exhibit to Hodges's habeas petition, which indicate a hospital admission date of September 2, 1999. The admitting hospital is the one Purviance identified with Hodges's second suicide attempt, but the hospital's indication that he had overdosed on 100 Xanax corresponds to Purviance's description of Hodges's first attempt.

some facts *similar* to those set out above were among those raising a reasonable doubt as to a defendant's competence to stand trial. For example, suicide attempts figured in *Pate v. Robinson* (1966) 383 U.S. 375, 381 (defendant shot and killed his 18-month-old son, shot himself in the head, then went to a nearby park and tried to take his life again by jumping into a lagoon), *Drope v. Missouri* (1975) 420 U.S. 162, 166-167, 181 (*Drope*) (defendant shot himself in the abdomen on the second day of trial, resulting in three weeks' absence from the proceedings) and *Moran v. Godinez* (9th Cir. 1992) 972 F.2d 263, 265 (*Moran I*) (suicide attempt a few months before plea hearing).[3]

Medications were also considered in the *Moran* cases. There the defendant took Inderal (used in the management of hypertension), Dilantin (an antiepileptic drug), Phenobarbitol (a sedative) and Vistaril (for anxiety and tension) (*Moran I, supra*, 972 F.2d at p. 265 & fn. 4), but the record was silent as to "what dosages he was given, the times they were administered, and the effect they had on him" (*Moran III, supra*, 57 F.3d at p. 695). The medications given to Hodges were antidepressants (Prozac, Remeron and Elavil) and the mood stabilizer Neurotin. Nothing in the record suggests they interfered with his ability to understand the proceedings or to assist counsel in preparing his defense.

Finally, under the rubric "general mental condition," Hodges points to his 14-year history of alcoholism, depression, suicidal thoughts and attempts, hospitalization, psychotherapy and medication for depression and anxiety, relying generally on *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666 (*Moore*) (psychiatrist's report and prison records reveal extensive history of mental illness including hospitalizations, repeated suicide attempts, hallucinatory episodes and psychiatric therapy). He asserts, in particular, that depression was one of three factors requiring a competency hearing in the

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3 The issue in *Moran I* was the defendant's competence to waive his constitutional rights and plead guilty. (*Moran I, supra,* 972 F.2d at p. 265). In *Godinez v. Moran* (1993) 509 U.S. 389, 396-400 (*Moran II*), the Supreme Court held the competency standard for waiving constitutional rights is the same as the competency standard for standing trial. On remand, the court of appeals again found the evidence, including the suicide attempt, mandated a competency hearing. (*Moran III, supra*, 57 F.3d 690 at p. 695.)

Moran cases. This assertion rests not on the cited authority (*Moran I, supra*, 972 F2d at p. 265; *Moran III, supra*, 57 F3d at p. 695), which does not expressly mention depression, but apparently on Hodges's lay opinion that "firing [one's] lawyers and submitting to imposition of the death penalty" is a manifestation of depression.

"There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Drope, supra*, 420 U.S. at p. 180.) In each of the cases on which Hodges relies, there was a particular pattern of irrational behavior that led the court to conclude that due process required a competency hearing. It is not unusual for a criminal defendant to have a history of depression and anxiety, resulting in periodic psychotherapy and medication, occasional hospitalization and even suicide attempts. But not every such criminal defendant is incapable of understanding the proceedings or assisting defense counsel. In this case, there was no evidence that Hodges's suicide attempts, medication and/or general mental condition had any negative impact whatever on his ability to understand the nature of the criminal proceedings and rationally assist counsel in the conduct of his defense. On the contrary, appointed counsel met with Hodges on 13 separate occasions and discussed the case with him. She discussed the prosecutor's offer of a negotiated settlement with him on six separate occasions. They also discussed the consequences of his entering a plea. Counsel's investigator met with Hodges on three occasions. He appeared to understand the discussion, and never said he did not. Hodges executed the change of plea form indicating he had discussed with counsel the "facts, merits, and possible defenses" of his case and understood his rights, and the terms and consequences of his plea. The court found "a knowing and intelligent understanding and express waiver of" his constitutional rights, which presupposes, both logically and legally (*Moran II, supra*, 509 U.S. 389, 401 & fn. 12), the *ability* to understand the proceedings.

We cannot say that, as a matter of law, this record raises a doubt as to Hodges's competency to stand trial, nor was the trial court's failure to initiate further proceedings an abuse of discretion.

II. Ineffective Assistance of Counsel

Hodges also contends defense counsel rendered ineffective assistance by failing to (1) object to the trial court's failure to state reasons for its sentencing choices, (2) object to the inadequacy of the probation report, and (3) file a statement in mitigation.

"To establish constitutionally inadequate representation, a defendant must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1057-1058.)

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny. [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In general, reviewing courts defer to trial counsel's tactical decisions in assessing a claim of ineffective assistance, and the burden rests on the defendant to show that counsel's conduct falls outside the wide range of competent representation. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 349.) "It is well settled that counsel is not ineffective in failing to make an objection when the objection would have likely been overruled by the trial court. [Citations.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 924.)

"Counsel's duty at sentencing is to be familiar with the sentencing alternatives available to the court, to make sure that the court is aware of such alternatives, to explain to his or her client the consequences of the various dispositions available and to be certain that the sentence imposed is based on complete and accurate information. [Citations.]" (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085-1086.) "Gross mischaracterization of the likely outcome of [a] plea, combined with erroneous advice on the possible effects of going to trial, falls below the level of competence required for a defense attorney. [Citation.]" (*Torrey v. Estelle* (9th Cir. 1988) 842 F.2d 234, 237.)

A. Reasons for Sentencing Choices

As previously noted (*ante*, p. 2), the court sentenced Hodges to three consecutive eight-year terms, for a total of 24 years in prison, "pursuant to your original agreement." A court is required to state reasons for its sentencing choices. (§ 1170, subd. (c); Cal. Rules of Court, rule 4.406(b)(4)-(6).[4]) "It is an adequate reason for a sentence . . . that the defendant, personally and by counsel, has expressed agreement that it be imposed . . . ." (Rule 4.412(a).) But Hodges maintains he did *not* agree to a 24-year sentence.

The Attorney General submits that this contention is tantamount to an attack on the validity of a negotiated plea agreement without the requisite certificate of probable cause (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 79). Hodges replies that he is not challenging the *validity* of the agreement, but its very existence, i.e., he maintains there *was* no agreement for a specific term of imprisonment. We need not address the Attorney General's contention, however, since Hodges makes essentially the same argument in his habeas petition, which is not subject to the certificate requirement (§ 1237.5 ["No appeal shall be taken . . . ."]; see also *People v. Johnson* (1995) 36 Cal.App.4th 1351, 1353-1354).

The relevant facts are as follows: On the change of plea form, Hodges initialed the item which read, "The maximum punishment which the court may impose based upon this plea is 24 yrs. state prison," and also declared under penalty of perjury that he understood the consequences of his plea. At the change of plea hearing, defense counsel told the court, "My client understands what the maximum is." When Hodges waived his right to be sentenced by the judge who took his plea (*People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757), he was told he could withdraw the plea if the sentencing judge did not abide by its terms. In support of his motion to withdraw the plea, Hodges's new attorney stated in writing that he had entered a plea of no contest "for high term, a determinate sentence of twenty-four years state prison," and asserted that good cause

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[4] All further rule references are to the California Rules of Court.

existed to allow him to withdraw his plea of no contest "and an agreed-upon sentence of twenty-four (24) years in state prison."

In his response to Hodges's motion, the prosecutor stated that in exchange for the agreed-upon 24-year sentence, she had dismissed "the life charge"—the crime alleged in count one carries a 15-year-to-life penalty (§ 269, subds. (a)(4) & (b))—and advised defense counsel that if the case went to preliminary hearing, additional counts of violating section 269 would be added to the information. Hodges's appointed counsel declared under penalty of perjury that the offer she received from the district attorney was for a term of 24 years. She communicated the offer to Hodges, and they discussed the consequences of his entering a plea. She was unable to obtain a shorter sentence "based upon the facts of this case." The probation report noted, "There is Agreement to an Indicated Sentence of State Prison," and referred to an attached fixed term worksheet indicating an aggregate prison term of 24 years.

At the sentencing hearing, retained counsel reminded the court, "this was a stipulated sentence entered into by the defendant to a 24-year prison sentence," and though he later tried unsuccessfully to withdraw it, "we acknowledge Mr. Hodges did enter a plea to 24 years . . . ." The prosecutor submitted "on the agreement for the 24 years," and the court expressly sentenced Hodges pursuant to that agreement.

The record summarized above affirmatively shows that Hodges had a full understanding of the consequences of his plea (*Boykin v. Alabama* (1969) 395 U.S. 238, 242, 244). There is absolutely no showing he believed the court might impose a sentence of less than 24 years. The court was therefore not required to give reasons other than "pursuant to your original agreement," nor was counsel ineffective for failing to object.

B. Mitigating Circumstances

Hodges also contends counsel was ineffective for failing to object that the probation officer's report did not sufficiently individualize him by informing the court of mitigating circumstances (§ 1203.10; Rule 4.411.5), and for failing himself to present a statement in mitigation (§ 1170, subd. (b); Rule 4.437). These arguments are offered in response to the hypothetical assertion that, in the absence of mitigating factors, it was not

reasonably probable that an objection to the court's statement of reasons for its sentencing choices would have resulted in a lower sentence. That is, Hodges's "mitigating circumstances" contentions go to the prejudice prong of the ineffective assistance analysis (*ante*, part *II*.A) regarding the court's statement of its sentencing rationale. Since we conclude that counsel's representation was not deficient in this regard, we need not consider the prejudice argument. Or, as Hodges puts it, introduction of mitigating factors would be "pointless" if Hodges agreed to a term of 24 years, which we have determined that he did. He cites no authority for the proposition that defense counsel should have introduced mitigating factors in an effort to persuade the sentencing court to withdraw approval of the plea agreement.

III. Habeas Petition

In his writ petition, Hodges contends counsel rendered ineffective assistance (see *ante*, p. 8) by failing to introduce evidence of two additional facts, neither of which undermines our conclusion that counsel's performance fell "within the wide range of reasonable professional assistance" (*Strickland v. Washington* (1984) 466 U.S. 668, 689).

A. Competency

First, Hodges contends counsel should have presented evidence that he had experienced "command hallucinations," i.e., heard voices, on the issue of his competency to stand trial. (See *ante*, part *I*.) The evidence consists of a hospital discharge summary and a declaration by his mother. The hospital record indicates an admission date of September 2, 1999 and a discharge date of September 7, 1999. (See *ante*, fn. 2.) "Gleaning information from the Intake Record," it states, "Patient has history of having hallucinations . . . reportedly, " and, "He has a history of command hallucinations, according to the [Welfare and Institutions Code section] 5150." Upon examination, however, "He denies any history of auditory, visual or olfactory hallucinations. He denies the information that was presented earlier about command hallucinations." The discharging physician's final diagnosis does not include any reference to hallucinations, except to note, "Condition on Discharge: No evidence of . . . auditory, visual or olfactory hallucinations."

In a declaration executed in August 2002, Hodges's mother says she received a phone call from him in September 1999 around 10:30 p.m. [*sic*], in the course of which he said voices in his head were telling him bad things. A few weeks later, he said he heard his dead grandfather's voice.

Despite the fact that visual hallucinations were among the numerous factors considered by the court in *Moore, supra*, 464 F.2d at page 665, equivocal evidence of auditory hallucinations before September 1999 does not raise a reasonable doubt about Hodges's competence to stand trial (inability to understand the proceedings or to assist in his defense) in November 2000, when he pleaded no contest, or in May 2001, when he tried to withdraw his plea. There was no evidence he had such hallucinations at the time of trial, much less that they "render[ed] him unable to attend to surrounding events and conditions" (*People v. Samuel* (1981) 29 Cal.3d 489, 501; compare, *Pennington, supra*, 66 Cal.2d at p. 516 [during trial defendant was hearing voices of devil]). Thus, it cannot be said that either of Hodges's attorneys was ineffective for failing to introduce that evidence.

B. Sentence

Hodges also claims ineffective assistance regarding his sentence. He contends his original attorney should have informed him and made a record of the fact that she had agreed to a 24-year prison term, and his second attorney should not have assumed there was a valid agreement.

Despite Hodges's belated and self-serving declaration to the contrary,[5] we have concluded the record *does* establish Hodges knew of and agreed to the 24-year prison term. (*Ante*, p. 11.) Since there *was* a valid agreement, Hodges's second attorney cannot have been remiss in conceding that fact.

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[5] In his declaration, Hodges says what counsel told him "was not clear to me," and he "do[es] not believe" she told him about the 24-year sentence. He does *not* declare, as he asserts in the petition, that if he knew of the agreement he would not have accepted the plea bargain.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.